Loh Hee Thuan v Mohd Zani bin Abdullah

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–304 OF 2000
KAMALANATHAN RATNAM J
27 NOVEMBER 2002

Damages (Personal Injury or Death) — *Personal injuries — Deduction from award of damages — Assessment of damages — Whether trial judge had erred in making deduction — Whether appellant ought not to have been awarded loss of future earnings as he had not proved that he was in good health — Civil Law Act 1956 s 28A(2)(c)(i)*

Words and phrases — *'proved or admitted' — Civil Law Act 1956 s 28A(2)(c)(i)*

The appellant's claim was dismissed with costs in the lower court. The appeal court allowed the appellant's appeal and apportioned liability as follows: appellant 2/3 liable and the respondent 1/3 liable. This is the appellant's appeal against the award of damages of the sessions court. The appellant complained that the award was too low. The respondent cross appealed on two issues: (i) that the appellant ought not to have been awarded loss of future earnings as he had not proved that he was in good health as is required to be proved pursuant to s 28A(2)(c)(i) of the Civil Law Act 1956 ('the Act'); and (ii) if the court was mindful to make the award then a deduction ought to be made pursuant to the Court of Appeal's decision in *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512.

Held, allowing the appellant's appeal and dismissing the respondent's cross appeal:

(1) Whilst it was true that the appellant in this case before the court cannot boast of any intellectual achievements, yet there was no doubt that the appellant too must be considered as a conscious sufferer. From what he was to be what he is, to be constantly supervised and cared for and attended to, must certainly have a demoralizing and demeaning effect on the person. The court was of the view that a sum of RM100,000 would constitute a fair award (see p 218B–C); *Dr Yusuff bin Haji Mansur v Changkat Jering Sdn Bhd* [1997] 5 MLJ 530 followed.

(2) Whilst the court has a discretion to award a sum that is reasonable for hospital bills, the court found that in the special circumstances of this case it was unreasonable to have awarded only one-third the sum. Therefore, the court set aside the award of one-third made by the sessions court and granted the appellant the full claim on hospital bills (see pp 218F, 219B).

(3) The court did not think that the words 'proved or admitted' that the appellant was in good health as found in s 28A(2)(c)(i) of the Act must mean that the appellant's entire personal medical records must be tendered before the court could consider to make an award for loss of future earnings. The fact that he had led a

normal life up to the time of the accident and had led evidence that he was 'receiving earnings by his own labor or other gainful activity before he was injured' was sufficient to satisfy the requirement of proof as stated in s 28A(2)(c)(i) of the Act (see p 221G–H). A

(4) The issue of assessing loss of earnings is fixed. It is only in cases of loss of support that a scaling down needs to be done, such as in dependency cases. The court's task has been made much simpler in this case since it was the appellant himself who was claiming for his own loss of future earnings. In the circumstances, there was no place in this case for the applicability of the decision in *Takong Tabari*. The appellant was entitled to his full award of damages without any deduction of one-third (see p 223H–I); *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 distinguished and *Chan Chin Ming & Anor v Lim Yok Eng*[1994] 3 MLJ 233 followed. B C

D

[Bahasa Malaysia summary

Tuntutan perayu ditolak dengan kos di mahkamah bawahan. Mahkamah rayuan telah membenarkan rayuan perayu dan membahagikan liabiliti seperti berikut: perayu menanggung $^2/_3$ liabiliti dan responden menanggung $^1/_3$ liabiliti. Ini adalah rayuan perayu terhadap award ganti rugi mahkamah sesyen. Perayu telah mengadu bahawa award tersebut terlalu rendah. Responden telah membuat rayuan balas berhubung dua persoalan: (i) bahawa perayu tidak sepatutnya diawardkan dengan kehilangan mata pencarian kerana beliau tidak dapat membuktikan bahawa beliau berada dalam keadaan sihat sebagaimana yang perlu dibuktikan menurut s 28A(2)(c)(i) Akta Undang-Undang Sivil 1956 ('Akta tersebut'); dan (ii) jika mahkamah ingin membuat award maka satu pemotongan patut dibuat menurut keputusan Mahkamah Rayuan dalam *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512. E F

G

Diputuskan, membenarkan rayuan perayu dan menolak tuntutan balas responden:

(1) Meskipun adalah benar bahawa perayu dalam kes ini semasa di hadapan mahkamah tidak bercakap besar tentang apa-apa pencapaian intelektual, tetapi tidak boleh diragukan bahawa perayu juga harus dipertimbangkan sebagai seorang yang sentiasa mengalami penderitaan. Daripada apa beliau sebelumnya dan apa yang beliau telah jadi sekarang, sentiasa perlu diurus dan dijaga, pasti mempunyai kesan yang melemahkan semangat dan merendahkan maruah ke atas seseorang itu. Mahkamah berpendapat bahawa jumlah RM100,000 adalah satu award yang adil (lihat ms 218B–C); *Dr Yusuff bin Haji Mansur v Changkat Jering Sdn Bhd* [1997] 5 MLJ 530 diikut. H I

(2) Meskipun mahkamah mempunyai budi bicara untuk mengawardkan satu jumlah yang munasabah untuk bil-bil hospital, mahkamah mendapati bahawa dalam keadaan-keadaan khas kes ini ia adalah tidak munasabah untuk mengawardkan hanya satu pertiga jumlah tersebut. Oleh itu, mahkamah telah mengenepikan award satu pertiga yang dibuat oleh mahkamah sesyen dan membenarkan perayu mendapat tuntuan penuh ke atas bil-bil hospital tersebut (lihat ms 218F, 219B).

(3) Mahkamah tidak berpendapat bahawa perkataan-perkataan 'proved or admitted' yang perayu adalah dalam keadaan sihat sebagaimana yang didapati dalam s 28A(2)(c)(i) Akta tersebut membawa maksud bahawa segala laporan peribadi perubatan perayu harus ditenderkan di hadapan mahkamah sebelum mahkamah boleh menimbangkan satu award untuk kehilangan mata pencarian masa hadapan. Hakikat bahawa beliau telah menjalani kehidupan seperti orang biasa sehingga saat kemalangan tersebut dan telah mengemukakan keterangan bahawa beliau 'receiving earnings by his own labor or other gainful activity before he was injured' adalah mencukupi untuk memuaskan keperluan pembuktian sebagaimana yang dinyatakan dalam s 28A(2)(c)(i) Akta tersebut (lihat ms 221G–H).

(4) Persoalan tentang menilai kehilangan mata pencarian adalah tetap. Hanya dalam kes kehilangan penyara yang memerlukan pengurangan dibuat, contohnya dalam kes-kes tanggungan. Tugas mahkamah menjadi lebih senang dalam kes ini memandangkan perayu sendiri yang menuntut kehilangan mata pencarian masa hadapan beliau. Dalam keadaan sedemikian, tiada tempat dalam kes ini untuk memakai keputusan dalam *Takong Tabari*. Perayu berhak untuk mendapat award penuh ke atas ganti rugi tanpa pemotongan sejumlah satu pertiga (lihat ms 233H–I); *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 dibeza and *Chan Chin Ming & Anor v Lim Yok Eng*[1994] 3 MLJ 233 diikut.]

Notes

For cases on deduction from award of damages, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 448–449.

Cases referred to

Chong Chee Khong & Anor v Ng Yeow Hin [1997] 5 MLJ 786 (refd)

Dr Yusuff bin Haji Mansur v Changkat Jering Sdn Bhd [1997] 5 MLJ 530 (folld)

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233 (folld)

Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (distd)

Legislation referred to

Civil Law Act 1956 ss 7(3)(iv)(d), 8, 28A(2)(c)(i)
Evidence Act 1950 s 114(g)

Brijnandan Singh Bhar (*Brijnandan Singh Bhar & Co*) for the appellant.
P Ramanathan (*VP Nathan & Partners*) for the respondent.

Kamalanathan Ratnam J:

Preliminary issues

In this case, I heard the plaintiff's appeal against liability. In the lower court, the plaintiff's claim was dismissed with costs. On 31 October 2001, I allowed the plaintiff's appeal and apportioned liability as follows: plaintiff 2/3 liable and the defendant 1/3 liable. This is the plaintiff's appeal against the award of damages of the sessions court.

At the outset of the hearing of the appeal, Mr Ramanathan for the respondent/defendant intimated that although he was only served with the memorandum of appeal the day before, he was prepared to go on with the hearing of the appeal provided Mr Brijnandan for the appellant agreed to the respondent's oral application to cross appeal on two issues:

(i) that the plaintiff ought not to have been awarded loss of future earnings as he had not proved that he was in good health as is required to be proved pursuant to s 28A(2)(c)(i) of the Civil Law Act 1956 ('the Act'); and

(ii if the court was mindful to make the award then a deduction ought to be made pursuant to the Court of Appeal's decision in *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512.

Mr Brijnandan readily agreed and also informed the court, that he was also ready to respond to the two issues raised by Mr Ramanathan.

General damages for pain & suffering

The sessions court judge awarded a sum of RM66,000 for the head injuries which he classified as follows:

(i) cerebral contusion — RM3,000.

(ii) multiple contusions in the right temporal parietal and occipital region — RM3,000.

(iii) cystic encephalomalacia with gliosis, moderate atrophy at the left frontal and temporal lobes and diffuse brain atrophy resulting in slurred speech, inability to walk normally, inability to run and could fall easily with a chance of developing post-trauma epilepsy — RM60,000.

Mr Brijnandan complains that this award of RM66,000 is too low. On the date of the accident, ie 30 January 1996, the plaintiff was admitted to Hospital Seberang Prai. His Glasgow Coma Score ('GCS') on admission

was 4/15. In 1974, Teasdale and Jennett in Glasgow, developed a system for conscious level assessment. They discarded vague terms such as stupor, semicoma and deep coma, and instead described conscious level in terms of eye opening, verbal response, and motor response. The GCS is now used widely and in many hospitals throughout the world. Recording is consistent irrespective of the status of the observer and can be carried out just as reliably by a nurse as by a neurosurgeon. A score may be applied to each category of the grading system and the total sum to give an overall value ranging from three to fourteen. For example, if there is no eye opening, no vertical response and extending to pain a score of four is given (see *Neurology and Neurosurgery Illustrated* (3rd Ed) by Churchill Livingstone). With this background, it is necessary to see the first medical report from Hospital Seberang Jaya. His GCS had improved from four to 10/15. He was however immediately sent to General Hospital, Pulau Pinang. Whilst there his GCS improved to 14/15. He was then readmitted to Hospital Seberang Prai. From here he was sent to Hospital Bukit Mertajam for nursing care. Whilst here he collapsed and developed sudden onset of shortness of breath and his GCS came down to 3/15. His family immediately discharged him and had him admitted to Loh Guan Lye Specialist Centre ('Specialist Centre') where the consultant neurosurgeon stated that when the patient was admitted to the Specialist's Centre he had been unconscious since the accident. Since the defendant had not referred the patient to a specialist of his choice and since this aspect of the factual finding of the neurosurgeon had not been challenged, I find that the patient had indeed been unconscious for 11 days since he was admitted to the Specialist Centre on 11 February 1996.

The neurosurgeon's final assessment was that the plaintiff has now a change of character and behaviour in that he is now an entirely different person. He has very poor memory and is unable to remember the names of his very close friends. He is aggressive, easily angered and is unable to tolerate children whereas in the past he used to take care of children.

Presently he is unable to do anything at home. He is unable to walk normally and is unable to run. He is unstable and may fall easily. He suffers giddiness when there is a change of position. His right hand shakes when he holds anything. He is unable to read or write properly. He has slurred speech and is unable to talk normally and his speech is not understandable. He is also unable to work. He has diffuse brain atrophy. He had multiple haemorrhage contusion of the brain in both hemisphere. The specialist was of the view that these disabilities are permanent and that he cannot recover surgically or medically.

Counsel for the appellant referred me to the case of *Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor* [1997] 5 MLJ 530. The plaintiff there complained that he was in a depressive state when he started teaching at the University as he was unable to function satisfactorily. Amongst other things he had difficulty in concentration, there was loss of intellectual and cognitive functioning, he showed impairment in reasoned logical thinking and had an impaired ability to plan and organize tasks.

Whilst the learned senior assistant registrar had awarded RM60,000, on appeal Mohd Noor Ahmad J (as he then was) raised the award of damages to RM110,000 on the basis that whilst the plaintiff was not a mere vegetable he was a conscious sufferer. In that condition it would be particularly painful and distressing for a person such as the plaintiff with his intellectual achievements to find himself in the condition he was now in, especially to be incapable of any intellectual work. Whilst it is true that the plaintiff in the case before me cannot boast of any such intellectual achievements as Dr Yusuff, yet there is no doubt in my mind that the plaintiff too must be considered as a conscious sufferer. From what he was to be what he is, to be constantly supervised and cared for and attended to, must certainly have a demoralizing and demeaning effect on the person. I am of the view that a sum of RM100,000 would constitute a fair award under this head.

Claim for loss of interest in sex and impotency

On this issue I found no evidence in the medical reports to substantiate such a claim. Mr Brijnandan with his usual candour, admitted that there was no such medical evidence. However, he contended that the evidence of the husband and corroborated by the evidence of the wife would be sufficient to back up this claim. When I pointed out that such evidence was self-supporting and was insufficient without corroborative independent medical opinion Mr Brijnandan withdrew this claim.

Was the court correct in awarding only one-third of the hospital bills

The total hospital bill at Loh Guan Lye Specialist Centre amounted to RM5,819.95. Counsel for the defendant argued that the onus is upon the plaintiff to show that the Hospital Bukit Mertajam was incompetent to handle the situation. I do not think it is a question of incompetence. Every government hospital has adequate facilities and trained doctors. The question is not one of incompetence as the facts of this case will unfold. Whilst the court has a discretion to award a sum that is reasonable, I find that in the special circumstances of this case it was unreasonable to have awarded only one-third of the sum. There is evidence that on admission initially to Hospital Seberang Jaya, the plaintiff was immediately sent to the General Hospital, Pulau Pinang. Obviously, this would have indicated to the plaintiff's family that the plaintiff's injuries were indeed serious enough to warrant immediate transfer to the main hospital in Penang. After a few days, he was then re-admitted to Hospital Seberang Prai. From there, he was readmitted to Hospital Bukit Mertajam and as the medical report says, for nursing care. Whilst at this hospital, he collapsed and developed sudden onset of shortness of breath and most important of all, his GCS score came down from about normal 14/15 to 3/15. Is it any wonder that the plaintiff's family members decided to immediately take the plaintiff to a private Specialist Centre for special medical treatment? Bearing in mind that the plaintiff was sent to Hospital Bukit Mertajam for nursing care, his sudden collapse and the lowering of his GCS to 3/15 must have frightened the family members into thinking that the plaintiff was not getting the nursing

care he actually needed. What is important is that the family members were put in an apprehension of fear of losing the plaintiff. It is no use being wiser after anything unforetold had happened to the plaintiff. The prompt and caring attention attributed to the plaintiff by his immediate family members ought not to be disregarded. After all the sum is reasonable and not exhorbitant. I therefore set aside the award of one-third made by the sessions court and grant the plaintiff the full claim of RM5,818.95. In any case, there was no challenge by the defence that any of the bills were exhorbitant. They admitted to the entire bills. The only issue was whether the total sum was reasonable.

Insufficient award for future loss

It is not in dispute that the plaintiff was a salted-fish seller. He submitted his income tax J Form for year of assessment 1995 which showed his total earnings as amounting to RM14,876 thus averaging RM1,240 per month. Under cross-examination the only question asked of the plaintiff was as follows:

> Q: Encik pasti dapat RM1,000 sebulan.
>
> A: Saya pasti.

In addition, the plaintiff called his tax manager ('SP7') who prepared his accounts to be forwarded to the income tax. SP7 testified under cross-examination that he personally prepared the accounts of the plaintiff and that his profits for the year 1995 as shown in the documents amounted to RM15,283. The accident, we know, occurred on 30 January 1996. Mr Ramanathan for the defendant argued that this court ought not to disturb the findings of the trial court in having awarded RM500 per month as loss of income because the J Form produced was for year of assessment 1995 which meant that it only reflected the earned income of 1994. In support he relied on *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786. This was a case decided by me and in my view has no relevance to this case. In *Chong Chee Kong*, I rejected the first plaintiff's claim that he was subsequently, after the accident, employed by one 'Exclusive Enterprise' and was paid RM300 per month. I rejected this evidence on the basis that since the employer was available and was not called to testify, s 114(g) of the Evidence Act 1950 would apply. But by no stretch of the imagination can I apply *Chong Chee Khong* to the case before me because the plaintiff in this case not only had documentary evidence to prove his claim, he also called his tax manager to testify. In answer to a question from the court, Mr Ramanathan admitted that he did not raise this submission before the session court judge. I must take it therefore that Mr Ramanathan had indeed conceded to this award when he did not avail himself of the opportunity of raising the issue before the trial judge, before whom he ought to have raised any such objection.

I therefore award a sum of RM1,000 per month for the number of years awarded by the sessions court.

No award for nursing care

During the course of his submission, counsel for the plaintiff informed the court that by inadvertence he had omitted to include in his memorandum of appeal this fifth ground, praying for nursing care which was rejected by the sessions court. Whilst I pointed out to Mr Brijnandan that since he had not included this prayer in his memorandum I would not, in all fairness to the defence, allow this. I was extremely surprised when Mr Ramanathan interjected to say that he had no objection to this prayer being included as he was ready to argue that the learned sessions court judge was right in dismissing this claim. With such a concession, I agree to allow Mr Brijnandan's oral application to amend the memorandum of appeal.

Mr Brijnandan claimed a sum of RM200 per month as cost of future nursing care for the same number of years of purchase given for future loss of earnings, ie for five years. The plaintiff complains that in his judgment the learned sessions court judge did not give any reason why he did not make any award under this head. He merely said 'Nursing care tidak dibenarkan'.

Mr Ramanathan argued that this was not an apt case to award cost of nursing care since the medical report did not state that he needed nursing care. The wife testified that whilst the husband is able to walk inside the house she does not allow him outside because of his unstable walk. There is clear medical evidence that after the accident the plaintiff has an unstable walk and has giddiness especially when changing position and the specialist had categorically stated that the plaintiff is unable to walk normally. Obviously, whilst the wife would be able to minister to him, she certainly would have to devote much of her time which she would have otherwise spent on house work, towards attending to her husband. It is fair therefore that the plaintiff be provided with some assistance for the same number of years as has been awarded for loss of future earnings. But what is a fair sum to award? Since the defendant had not made any suggestions, I accept the sum of RM200 suggested by Mr Brijnandan. The plaintiff will therefore have a sum of RM200 per month for five years. There will be no interest on this award.

I now have to consider the cross appeal raised by Mr Ramanathan.

No evidence that plaintiff is in good health

Mr Ramanathan referred me to s 28A(2)(c)(i) of the Act which reads as follows:

> (c) in awarding damages for loss of future earnings the court shall take into account:
>
> (i) that in the case of a plaintiff who has attained the age of fifty-five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labor or other gainful activity before he was injured.

Counsel pointed out that the medical reports of the plaintiff showed that prior to the accident, the plaintiff was suffering from diabetes mellitus and hypertension. Whilst there is evidence in the first medical report that the plaintiff had a history of diabetes mellitus, there was no recorded evidence that he was suffering from hypertension. Mr Ramanathan also contended that the plaintiff had pulmonary embolism and also had a stroke. The medical report from General Hospital Pulau Pinang stated that the CT scan showed that there was an old infarct in the right basal ganglia. As for the diabetes, Mr Pandyaraj, a medical specialist from Hospital Seberang Jaya testified that the diabetes was under control because if it was not, the plaintiff would have been referred to the medical side for treatment and in which case he would have recorded this fact in the medical report. He also confirmed that diabetes by itself could not cause contusion of the brain. Contusion could only be caused by trauma such as an accident. As for the old infarct, SP4, the doctor who attended to the plaintiff at Hospital Besar Pulau Pinang, testified that the old infarct could not have caused the residuals sustained by the plaintiff. Finally, SP5 the neurosurgeon who actually attended to the plaintiff testified that the contusion to the brain was not caused by a stroke but by a hard blow to the head such as from a trauma. He further testified that the plaintiff had normal blood pressure and that there was no record of diabetes. He also confirmed that the old infarct had nothing to do with the residuals sustained by the plaintiff.

After Mr Ramanathan had submitted on this issue, I asked him if he had raised all these issues before the learned sessions court judge for his consideration. Mr Ramanathan said that he had not. However, it was his argument that even if he did not do so at the trial stage he was entitled as of right to raise this issue at the appellate stage since an appeal is by way of a rehearing.

On the facts, I find that there is sufficient evidence to show that the plaintiff was leading a normal life before the accident. Whilst the plaintiff's wife testified that her husband had diabetes, the medical reports and the various doctors' evidence showed that the plaintiff's diabetes was well under control. As for the old infarct, there is no reason to doubt the neurosurgeon who testified that the residual defects the plaintiff is undergoing were not due to the old infarct but to injury to the brain caused by the accident.

I do not think that the words 'proved or admitted' that the plaintiff was in good health as found in s 28A(2)(c)(i) of the Act must mean that the plaintiff's entire personal medical records must be tendered before the court could consider to make an award for loss of future earnings. The fact that he had led a normal life up to the time of the accident and had led evidence that he was 'receiving earnings by his own labor or other gainful activity before he was injured' is sufficient in my view to satisfy the requirement of proof as stated in s 28A(2)(c)(i) of the Act. But in this case the plaintiff is in an even better position. Since Mr Ramanathan had conceded that he did not raise these issues before the learned sessions court judge, it is my judgment that by his conduct he had 'admitted' that the plaintiff was in

good health and that such conduct is sufficient in my view to satisfy the requirement of the word 'admitted' as stated in s 28A(2)(c)(i) of the Act. The defendant's cross appeal on this issue must therefore fail. A

One-third deduction based on Takong Tabari

In *Takong Tabari,* the plaintiff's husband died as a result of 'inflammable gas escaping and causing explosions'. The plaintiff had claimed damages under ss 7 and 8 of the Act. The trial judge awarded the plaintiff RM270,000 for loss of dependency but from this amount he deducted one-third for contingencies, other vicissitudes of life and accelerated payment thereby leaving a balance of RM180,000 as general damages. B C

The plaintiff appealed against this decision contending that there should not be any deduction from the total loss of dependency awarded to her and that such a deduction was contrary to law due to proviso (d) of s 7(3)(iv) of the Act and therefore the discretion to deduct a sum for contingencies, other vicissitudes of life and accelerated payment at common law was no longer available because there was already a built-in deduction in the statutory formula itself and that a further deduction was improper. D

The Court of Appeal held that it was bound by the decision of the then Supreme Court in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 which stated that as a matter of interpretation if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness and as proviso (d) to s 7(3)(iv) of the Act lacked such clearness, the common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payments continued to be in force. E

It is therefore necessary to reproduce s 7(3)(iv)(d) which reads as follows: F

> (iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the court shall:
> (a) ...
> (b) ...
> (c) ...
> (d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2. G H

In *Chan Chin Ming*, the mother of an unmarried 25-year-old son claimed for loss of support caused by his death. One of the issues before the court was whether in a claim by a parent for loss of support in respect of an unmarried son, the statutorily fixed number of year's purchase as set out in s 7(3)(iv)(d) of the Act was applicable. The Supreme Court ruled that the I

court retained the discretion to reduce the number of years of purchase to a period less than 16 years to provide for contingencies and the contingency considered in *Chan Chin Ming* was the prospect of the deceased marrying had he not died. The Supreme Court thus reduced the statutorily fixed 16 years to seven years.

It is important to note that in *Chan Chin Ming*, the Supreme Court said at pp 242–243 as follows:

> Let us examine sub-para (d) reproduced above. It deals with first, the assessment of loss of earnings, and not, be it noted, loss of support. They are related to each other but are yet distinctly apart, for it will be remembered that the earnings of the deceased, or the amount of such earnings by the deceased by virtue of his death is merely the starting point in assessing the loss of support sustained by a dependant, before taking account of personal expenses of the deceased and contingencies, see *Davies v Powell Duffryn Associated Collieries (No 2)* (1942) AC 601 at p 617.
>
> The distinctiveness of the loss of support from the loss of earnings is worth emphasizing once more because it is an indisputable fact that the duration of loss of support sustained by a parent in respect of an unmarried child ordinarily and simply cannot be ever so long as the duration of the loss of support sustained by a widow and the children in respect of her husband, for example. Please see the Federal Court's decision on this point to the same effect in *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 in which the number of years' purchase fixed by the court of first instance at 17 years, was reduced to seven years for a mother who claimed similarly as a dependant in respect of her deceased unmarried child. This Federal Court case was decided before sub-para (d) came into force, it should be noted.
>
> Having regard to the state of the general system of the law before the coming into force of sub-para (d) on 1 October 1984, sub-para (d) seems to be tailor-made for a claim by a spouse and children as dependants in respect of a deceased spouse, because under the general system of law, both before and after the enactment of sub-para (d), the duration of a claim for loss of support is usually as long as the deceased's loss of earnings which would have been earned had the deceased lived.
>
> On the other hand, the state of the general system of law relating to a parent's claim as a dependant for loss of support in respect of an unmarried child before the enactment of sub-para (d) was that such loss of support would either cease or be reduced considerably on the almost invariable contingency of subsequent marriage of such unmarried child. If the learned judge was right, it would mean that this aspect of the law was swept away or changed.

What can be distilled from these principles is that the issue of assessing loss of earnings is fixed. It's only in cases of loss of support that a scaling down needs to be done, such as in dependency cases.

My task has been made much simpler in this case since it is the plaintiff himself who is claiming for his own loss of future earnings. In the circumstances, there is no place in this case for the applicability of the decision in *Takong Tabari*. The plaintiff is entitled to his full award of damages without any deduction of one-third.

Since the appellant/plaintiff had succeeded in his appeal and the respondent having failed on both issues on his cross appeal, I award the appellant the costs of this appeal and the cross appeal. A

Appellant's appeal allowed and respondent's cross appeal dismissed.

Reported by Peter Ling B

C

D

E

F

G

H

I